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No. 93-643

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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BESSEMER & LAKE ERIE RAILROAD COMPANY,
*Petitioner,*

v.

WHEELING-PITTSBURGH CORPORATION, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## SUPPLEMENTAL RESPONSE OF PETITIONER

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THOMAS S. KILBANE
JAMES V. DICK
TIMOTHY W. BERGIN
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
Cleveland, Ohio 44114
(216) 479-8500

HOWARD J. TRIENENS *
CARTER G. PHILLIPS
G. PAUL MOATES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

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## TABLE OF AUTHORITIES


| | Page |
|---|---|
| *Associated Gen. Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) | 3 |
| *Commissioner* v. *Standard Life Accident Ins. Co.*, 433 U.S. 148 (1977) | 5 |
| *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) | 3 |
| *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922) | 2 |
| *Pinney Dock & Transp. Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988) | 2 |
| *United States* v. *Mitchell*, 463 U.S. 206 (1988) | 5 |

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This brief is submitted pursuant to this Court's order of December 13, 1993, directing the parties to address the impact of the settlement of the claims of several respondents on the questions presented by the petition for a writ of certiorari.[1] Since the entry of that Order, petitioner has notified the Court that it reached settlement agreements with three additional respondents,[2] and this

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[1] On December 9, 1993, USX Corp. (the former parent of petitioner B&LE) entered into an agreement with LTV Corp. (on behalf of respondents Republic Steel Corp. and Jones & Laughlin Steel Corp.) settling all of their claims in this case. On that date, a stipulation was filed with this Court.

[2] On December 10, 1993, USX reached a separate agreement with respondents C.D. Ambrosia Trucking Co., Erie-Western Pennsyl-

brief will address the impact of all settlements on the questions presented. The short answer is that the settlements have *no* impact on the questions presented because each of the legal issues presented by the petition remains alive and appropriate for review by this Court.

1. The first issue presented by the petition is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), holding that tariff rates cannot give rise to antitrust injury, is inapplicable to treble damage claims by shippers when tariff rates are the primary but not the exclusive means of precluding market entry, and altogether inapplicable when competitors of the defendant, rather than shippers, are the antitrust plaintiffs. See Pet. 10-19. Both aspects of the *Keogh* issue continue to be presented by this case as it applies to the remaining respondents.

The remaining respondents include both shippers and competitors whose damage awards would be reversed under a proper interpretation of *Keogh*. Respondents Wheeling-Pittsburgh Steel Corp., National Steel Corp., and Sharon Steel Corp., who were shippers on the railroads, have damage awards in their favor that total in excess of $167 million. See Republic Opp. 65A-67A. Those awards would be reversed in their entirety were this Court to reject the Third Circuit's unwarranted exception to *Keogh*—as applied to shippers—for conspiracies to exclude competitors.

Moreover, respondent Tauro Brothers Trucking Co. was awarded $11.4 million as a competitor of the railroads. See *id.* at 70A. Tauro's award would be reversed in its entirety were this Court to adopt the approach taken by the Sixth Circuit in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.),

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vania Port Authority, and Codan Corp. settling all of their claims. On December 17, 1993, a stipulation was filed with this Court as part of that settlement. No further settlements between petitioner and the remaining six respondents have occurred.

*cert. denied*, 488 U.S. 880 (1988), and hold that *Keogh* bars rate-related claims brought by competitors.

Respondents Wills Trucking, Inc., and Toledo World Terminals, Inc., likewise can claim damages in excess of $1 only by showing that a particular rate would have been established in a tariff for shipments of iron ore from the dock they proposed to purchase or lease.[3] But that claim is manifestly rate-related, and thus any holding by this Court that rate-related activities must be excised from the damages calculation would undermine Wills' claim as well.[4]

2. The second issue presented by the petition is whether an antitrust plaintiff that is an indirect purchaser under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), may nonetheless recover treble damages if it asserts standing under the balancing approach set forth in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). See Pet. 19-30. This issue, too, is unaffected by the settlements.

After the settlements, all pass-on theories under which the steel company respondents recovered damages remain at issue in this case. Respondent Wheeling-Pittsburgh was awarded $37 million based on the amount it would have saved in payments to *vessel* companies for lake transportation. See Republic Opp. 65A. The court of appeals acknowledged that Wheeling-Pittsburgh was an indirect purchaser as to these damages (Pet. App. 50a),

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[3] These respondents argued to the jury that they were damaged by the absence of a competitive linehaul rate for hauling iron ore from a dock which they were able to purchase in 1975. *E.g.*, Tr. 1913-14 (July 11, 1989).

[4] National Steel's claims implicate both prongs of the Third Circuit's *Keogh* ruling because it "operated its own self-unloading vessel" and thus sought and was awarded damages in part as a "competitor." Pet. App. 29a n.4. But also during the relevant period, National was a shipper and at trial it sought and was awarded damages for excessive dock handling charges.

and respondents did not contend otherwise in their Opposition. Respondents Wheeling-Pittsburgh, National Steel, and Sharon Steel likewise were indirect purchasers as to the $50.9 million in damages they were awarded for the amounts they would have saved in payments to private docks. See Republic Opp. 65A-67A. Moreover, National Steel's and Wheeling-Pittsburgh's other damage awards, totalling $78.5 million (see *id.* at 65A-66A), depend upon being charged lower dock handling charges by private docks and lower prices by shipbuilders, and consequently those awards are also barred under *Illinois Brick*. Were this Court to reject the Third Circuit's holding that the *AGC* standing inquiry supersedes the indirect purchaser rule of *Illinois Brick*, these pass-on damage awards would be reversed.

3. Because both legal questions presented in the petition are still at issue among the remaining parties, the only consequences of the settlements involve matters unrelated to the questions presented in the petition. The settlements reduce the number of respondents before the Court and reduce the total amount of the jury's award remaining at issue. All of the reasons for granting the petition—namely, the striking conflicts among the courts of appeals concerning application of both the *Keogh* and *Illinois Brick* doctrines, the Third Circuit's unprecedented and unwarranted conclusion that the standing analysis of *AGC* supersedes the indirect purchaser rule of *Illinois Brick*, and the importance of these issues to the railroad industry, as well as to other regulated industries—remain as compelling after the settlements as they were before. Moreover, the reduction in the number of respondents will simplify the presentation of the issues to the Court and reduce the number of briefs that will be filed. Thus, that consequence should make this case an even more attractive vehicle for resolving the circuit conflicts identified in the petition.

Likewise, the remaining amount at stake—approximately $200 million (including interest and attorneys fees)—is a large sum that exceeds what this Court previously has expressly identified is sufficient by itself to warrant review by certiorari. See *United States* v. *Mitchell*, 463 U.S. 206, 211 n.7 (1983) ("the damages claimed in this suit alone may amount to $100 million"); *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977) ("substantially more than $100 million is in dispute"). In addition, a decision by this Court would affect far more than $200 million, both because respondent Wills has been granted a new trial in which it will seek damages in excess of $22 million (pretrebling) and because other plaintiffs have filed actions seeking hundreds of millions in damages arising out of the same occurrences. *Armco Steel Co.* v. *CSX Corp.*, No. 93040613 (C.P. Butler County, Ohio filed April 30, 1993); *Pacific Great Lakes Corp.* v. *Bessemer & Lake Erie R.R.*, No. 189590 (C.P. Cuyahoga County, Ohio filed May 9, 1990). Those latter cases would be dramatically and directly affected by the holding of this Court on both issues presented because the *Keogh* doctrine preempts state law and Ohio antitrust law incorporates the limitations of *Illinois Brick* on indirect purchaser claims.

The Third Circuit's decision in this case is unprecedented both in its contorted interpretations of § 4 of the Clayton Act and in the size of the judgment it affirmed. The decision's status as binding precedent in the Third Circuit, the multiple conflicts among the circuits it creates and worsens, and the importance of the issues presented in the petition are wholly unaffected by the settlements. Review by this Court therefore is warranted.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS S. KILBANE
JAMES V. DICK
TIMOTHY W. BERGIN
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
Cleveland, Ohio 44114
(216) 479-8500

HOWARD J. TRIENENS *
CARTER G. PHILLIPS
G. PAUL MOATES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

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